

**IN THE  
MISSOURI COURT OF APPEALS  
EASTERN DISTRICT**

J. H. BERRA CONSTRUCTION CO., INC.	)	
	)	
Appellant,	)	Appeal No. ED 84102
	)	
vs.	)	
	)	
RANDY HOLMAN, ASSESSOR	)	
	)	
JEFFERSON COUNTY, MISSOURI	)	
	)	
Respondent	)	

APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY  
TWENTY-THIRD JUDICIAL CIRCUIT  
DIVISION III  
HONORABLE M. EDWARD WILLIAMS

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**REPLY BRIEF OF APPELLANT**

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I. The State Tax Commission erred in affirming the assessed valuation of Appellant's construction equipment in Jefferson County because under Sections 138.470.4 and 536.140.2 RSMo., the Commission's decision is not authorized by law or supported by competent and substantial evidence upon the whole record in that:

A. The construction equipment had only a temporary presence and was not regularly kept in Jefferson County and hence was not "situated" in Jefferson County on January 1, 2001, within the meaning of section 137.095 RSMo.

B. The Commission utilized an incorrect standard of requiring Appellant to prove that its construction equipment was "continuously and habitually employed" in another county rather than the correct standard of whether Appellant's construction equipment was "situated" in Jefferson County within the meaning of Section 137.095 RSMo. by virtue of having a permanent presence in Jefferson County, which said permanent presence was not established by the evidence before the Commission. .... 2

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**POINT RELIED ON**

**I. The State Tax Commission erred in affirming the assessed valuation of Appellant's construction equipment in Jefferson County because under Sections 138.470.4 and 536.140.2 RSMo., the Commission's decision is not authorized by law or supported by competent and substantial evidence upon the whole record in that:**

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## ARGUMENT

**I. The State Tax Commission erred in affirming the assessed valuation of Appellant's construction equipment in Jefferson County because under Sections 138.470.4 and 536.140.2 RSMo., the Commission's decision is not authorized by law or supported by competent and substantial evidence upon the whole record in that:**

**A. The construction equipment had only a temporary presence and was not regularly kept in Jefferson County and hence was not "situated" in Jefferson County on January 1, 2001, within the meaning of section 137.095 RSMo.**

Buchanan County v. State Tax Commission, 407 S.W.2d 910, (Mo.1966) holds that whether property is taxable in a given Missouri county depends upon whether on January 1, the property was regularly kept there, that is, whether the permanent situs or location of the property was in the county seeking to tax it, and temporary presence in the county is not sufficient. Id. at 914. Respondent argues at page 23 of his brief that the measure as to what constitutes a taxable situs "is whether or not the property has been there long enough to establish a taxable situs," and "keeping heavy equipment at various job sites for extended periods of time" is sufficient for the property to become situated in Jefferson County. Respondent admits in his brief that there is no bright line rule as to what time period is enough for construction equipment to become situated in Jefferson County which is precisely the fatal flaw in using a time period to determine whether the equipment's presence is temporary or permanent. Irrespective of the length of time of the project, or length of time of particular equipment used on the project, the proper criteria as dictated by Buchanan County is whether

the equipment had a permanent situs in Jefferson County as of January first.

In Sanford Independent School District v. H.B. Zachry Company, 393 S.W.2d 402 (CCA Tex 1965), a contractor brought equipment into the school district to work on a dam project scheduled for three years until complete. The Texas statute provided that property shall be assessed in the county where it is “situated,” and all property “temporarily” removed from the state or county shall be assessed in the county where the principal office of such owner is situated. The court held that the situs of the equipment was not in the district but in the county where the contractor had his principal office. In so holding the court noted that the term “temporarily” means lasting for a time only, and because as soon as the dam was completed or a certain piece of equipment was no longer needed at the dam it was transferred to another job, it was only temporarily in the district.

Ace Construction Co. v. Board of Equalization of Douglas County, 98 N.W.2d 367 (S. Ct. Neb. 1959), involved the situation where a construction company owned heavy equipment located in and used for construction in states other than the company’s domiciliary state. The equipment was held to have its permanent situs at the domicile of the owner because the equipment was being constantly moved and only temporarily located outside of the domiciliary state; hence it never acquired an actual situs outside of the location of the corporate headquarters. In considering the concept of “permanency,” the court in Ace held at p. 369:

“Permanency of tangible personal property in a taxing area is determined by the ownership and use for which the property is designed and does not embrace the idea of a forever-fixed location or the thought that the owner bringing personal property in the area has no present intention of ever removing



it; but it excludes the idea of mobile personal property which happens to be in the taxing area at the moment of the assessment of property which, for some definite purpose of the owner, has come to rest within the area for a limited time.”

Respondent cites Griggsby Construction Company v. J.W. Freeman, Tax Collector, 32 So. 399 (La. 1901); and Hamilton & Gleason Co. v. Emery County, 285 P. 1006 (Utah 1930) in support of its argument that Berra’s equipment had a permanent situs in Jefferson County. Unlike the present case, both Griggsby and Hamilton & Gleason involved situations where foreign corporations brought equipment into the taxing state. In Griggsby the court chiefly relied on the concept that property brought into the state which enjoys the benefit of protection of laws of the state should pay its just quota toward defraying the expense of the administration of those laws. Id. at 401. The benefit of protection rationale employed in Griggsby has no counterpart in Section 137.095 as construed by the Missouri Supreme Court in Buchanan County which instead requires a finding that the property has acquired a permanent presence in the county by virtue of being regularly kept in the county. The phrase “regularly kept” as used in Buchanan County has the same meaning as the phrase “customarily kept” which was construed in Wm. J. Kennedy & Son, Inc. v. Town of Albany, 225 N.W.2d 624 (Wis. 1975) as excluding construction equipment moved from jobsite to jobsite as needed and brought to the town of Albany only when there was a job to be performed there. The equipment was physically present in the town from October, 1969 to June, 1970.

Respondent’s argument focuses on the length of time that Berra’s equipment was physically present in Jefferson County rather than the purpose of its presence in Jefferson

County. The term “situated” in Section 137.095 is not the same as providing that the property shall be taxable where “physically present”. Buchanan County at 914.

Thus, in determining whether Berra’s equipment had a temporary or permanent presence in Jefferson County, the focus should be on the purpose of use of the equipment while working on projects within the county rather than the length of time of the projects or the length of time each piece was physically present on the project. The evidence is uncontroverted that Berra’s equipment was brought into Jefferson County for the sole purpose of working on projects, following which it was moved to another project. This use is more consistent with a temporary presence than a permanent presence.

It is noteworthy that the State Tax Commission did not adopt Respondent’s “length of time” rationale in its decision. Rather the Commission erroneously based its decision upon the inapplicable presumption that a county which provides protection for the property on a “continuous and habitual basis” is entitled to assess and tax the property (II LF 381), which error is discussed in Point B of this Reply Brief.

**B. The Commission utilized an incorrect standard of requiring Appellant to prove that its construction equipment was “continuously and habitually employed” in another county rather than the correct standard of whether Appellant’s construction equipment was “situated” in Jefferson County within the meaning of Section 137.095 RSMo. by virtue of having a permanent presence in Jefferson County, which said permanent presence was not established by the evidence before the Commission.**

The sole issue in this case is whether Berra’s construction equipment was taxable by Jefferson County by virtue of it being “situated” in that county as that term is used in Section 137.095 RSMo. The Commission erroneously utilized the legally incorrect standard found in BiGo Markets, Inc. v. Morton, 843 S.W.2d 916 (Mo. 1992) of requiring Berra to prove that its equipment was “continuously or habitually employed” in another county. The correct standard is set out in Buchanan County v. State Tax Commission, 407 S.W.2d 910 (Mo. 1966) which provides clear and unequivocal directions that the Commission must determine whether on January 1, the permanent situs of Berra’s equipment was in Jefferson County. To decide this issue in favor of Respondent, Buchanan County requires a finding that the property must have more than a temporary presence in Jefferson County, and that such presence must be more or less permanent. The Commission made no such finding in its decision.

Respondent argues at p. 26 of his brief that Buchanan County goes no further in explaining how to make a determination as to how “situated” is to be determined. Contrary to Respondent’s argument, Buchanan County does provide guidance as to the taxable situs of construction equipment by citing Assessor of Sheffield v. J.F. White Contracting Co.

130 N.E.2d 696 (S. Ct. Mass, 1955) in which a town sought to assess machinery brought into the town for use in construction of a bridge. Whenever the use of any of the machinery was required, the particular piece was brought into the town, put into operation on the job and when the operation was completed, it was removed. The court noted the general principle of property taxation that personal property is taxable at the domicile of the owner unless it has acquired a permanent situs in some other taxing jurisdiction. Id. 699. The court held that the machinery was not situated, and hence not taxable by the town because property cannot be said to be situated in a place merely because it is temporarily in use there on the tax day. To have a situs or to be situated implies “some degree of permanence of location” and “temporary lodgment or migratory presence ... is not enough.” Id. 698.

Respondent suggests that Peabody Coal Co. v. State Tax Commission, 731 S.W.2d 837 (Mo. 1987) supports the proposition that a court must ascertain whether there is a “continuous presence” in the situs. In Peabody Coal, as in BiGo, the issue involved interstate commerce and due process concepts as to the taxing power as between states. In Peabody Coal, a corporation with its principal office in the City of St. Louis, owned two airplanes which were hangered in St. Louis County and spent 75% of their ground time there. After St. Louis County assessed the airplanes, the taxpayer appealed to the State Tax Commission, asserting that the aircraft have a taxable situs in Indiana as well as in Missouri, and that Missouri, under the commerce clause of the United States Constitution and the due process clause of the Fourteenth Amendment, may not tax the aircraft at their full value. In upholding the St. Louis County assessment, the Missouri Supreme Court noted at p. 839 that “...the books are full of

cases holding that interstate commerce may be required to pay its own way, in exchange for protection and service furnished by state and local governments.” The Court held that to acquire an “actual situs” in another state so as to limit the exclusive taxing authority of the home state, there must be “continuous presence in another state which thereby supplants the home state and acquires the taxing power over personalty that has become a permanent part of the foreign state.” In sum, standards such as “habitually and continuously employed” in another state, “continuous presence” in another state and “benefits of protection and service” found in BiGo and Peabody Coal are limited to multi-state situs issues involving interstate commerce, and are inapplicable to any determination of the Missouri county in which property is situated in cases not involving interstate commerce.

The Commission decided this case on the basis that Berra failed to prove that its equipment was habitually and continuously employed in another county. In so doing, it imposed an incorrect burden of proof and utilized an incorrect standard of law. The Commission totally failed to assess the evidence under the correct standards set forth in Buchanan County; and had the Commission utilized the Buchanan County standards, the evidence clearly established that Berra’s equipment, having been brought into the County for the sole purpose of working on a construction project and then removed, had only a temporary presence and was not regularly kept in Jefferson County.

### **CONCLUSION**

For the reasons stated herein, the Commission should reverse the decision of the State Tax Commission and hold that Respondent’s assessment of personal property taxes to

Complainant for 2001 be set aside and held for naught.

Respectfully Submitted,  
Welsh & Hubble, P.C.

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**CERTIFICATE OF COMPLIANCE WITH**  
**MISSOURI SUPREME COURT RULE 84.06(b) AND RULE 84.06(g)**

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word count function on Word Perfect 10 by which it was prepared, (Word being unavailable), contains 2,756 words, exclusive of the cover, this Certificate of Compliance, and the signature block.

The undersigned further certifies that the diskette filed herewith containing the Appellant's Brief in electronic form complies with Missouri Supreme Court Rule 84.06(g) because it has been scanned for viruses and is virus-free.

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